

FILED

OCT 13 2005

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

**U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:) Chapter 11
)
) No. 4-97-bk-00004-JMM
ARIMETCO, INC.)
) **MEMORANDUM DECISION**
)
Debtor.) (Under advisement since September 13,2005)
)
) (Opinion to Post)

On September 13, 2005, this court heard testimony and took documentary evidence on a contested matter, pursuant to Fed. R. Bankr. P. 9014. Aero Nautical Leasing Corp. ("Aero Nautical") was represented by Dennis J. Clancy; the Debtor, Arimetco, was represented by Kasey C. Nye. The parties then briefed issues to the court. Having had the matter under advisement, and being fully advised in the premises, the court now rules.

FINDINGS OF FACT

1. The Debtor, Arimetco, filed a chapter 11 bankruptcy petition on January 2,1997. Its plan of reorganization (a liquidating plan) was confirmed on June 28,2004.

2. During the course of the case's administration, on September 29,2000, the Debtor entered into a contract with Aero Nautical (Ex. A). The contract contained three major parts:

- A. The immediate sale to Aero Nautical of mining equipment for \$1,076,000;
- B. The immediate sale to Aero Nautical of certain real property for \$20,000; and
- C. A two (2) year option to Aero Nautical, to purchase additional real estate for \$50,000. The consideration for

1 the option required a \$2,500 immediate payment, to be
2 credited against the option price if the option was
3 exercised.

4 3. Aero Nautical was give a due diligence "free look" period within which to
5 "investigate and research" the equipment and real property described in paragraphs 2.A and 2.B. above.
6 (Ex. A.) If Aero Nautical was not satisfied, it could cancel and would be under no further obligation to
7 close. Absent cancellation, however, it would be "deemed to have elected to proceed with the purchase."
8 (Ex. A, para. 5.)

9 4. The contract also provided that Aero Nautical was purchasing the property "solely
10 upon the basis of its investigation . . . and not on the basis of any representation, expressed or implied,
11 written or oral, made by the Seller or Debtor" (Ex. A, para. 12.)

12 5. Additionally, the contract provided, in paragraph 13, that:
13 (iii) Buyer, and not Seller, has provided the list of Equipment
14 set forth in Exhibit "A," and Buyer has conducted the due
15 diligence that it deems necessary with respect to the existence or
nonexistence of the Equipment.

16 (Ex. A, para. 13.)

17 6. As for remedies for breach, the contract stated:
18 In the event that any representation or warranty by a party is
19 untrue, the other party shall have all rights and remedies at law or
in equity.

20 (Ex. A, para. 13.)

21 7. The transaction closed on or about October 23,2000.

22 8. Two years later, on October 23,2002, Aero Nautical sent a timely letter expressing
23 its intention to exercise the option. (Ex. B.)

24 9. The 2000 contract required the option sale to close within 30 days after the option
25 was exercised. (Ex. A, para. 3.) It never did.

10. Instead of closing on the option as the contract specified, or depositing the \$47,500 remaining purchase price into an escrow account, Aero Nautical instead instructed its attorneys to hold the money in its trust account. (See Exhibits J and R.)

11. Aero Nautical then began to demand other conditions to closing on the option, dealing with (among other things), finding a mill and lathe that were present at the walk-through two years earlier, getting reimbursement for having paid the taxes on the option and other real property, and clearing up a "discrepancy" regarding the annex building (claim no. 110). (See Exhibits E, F, H, I, and J.)

12. Arimetco resisted Aero Nautical's efforts to gain additional concessions or offsets relative to its various claims, resulting in this litigation. (See Ex. P.)

ISSUES

1. Did Arimetco breach the contract of September 20, 2000? If so, what amount of damages did Aero Nautical suffer?
2. Was the option properly exercised?
3. If so, is Aero Nautical entitled to an offset for damages for breach of the original contract?
4. Does Arimetco owe Aero Nautical any reimbursement for real property taxes which Aero Nautical paid on the option property? If so, in what amount?

DISCUSSION AND CONCLUSIONS OF LAW

1. Breach of the September 29,2000 Contract

Addressing issue no. 1 above, the court finds and concludes that Arimetco did not breach the sale agreement of September 29, 2000. Although there may have been discrepancies between the items that Aero Nautical believed it was to receive, and that which it actually received, it assumed that risk by contract.

According to the contract, the entire risk of making sure that all property was on hand and as represented fell upon the Buyer. Aero Nautical cannot complain if it was short-changed; it was on notice that the duty of ensuring compliance fell to Aero Nautical.

Even if Aero Nautical felt cheated, it should have moved quickly, rather than raise such issues two years later, on the eve of its decision to exercise the option and attempt to link the two contracts. Aero Nautical waived any right to sue for damages, and instead improperly attempted to hold the option price hostage unless Arimetco capitulated to its demands.

As a result, for these reasons, the court finds and concludes that Arimetco is not liable for any breach of the September 29,2000 contract.

2. Exercise of the Option

The method by which the option was to be exercised was contained in clear and unequivocal language in paragraph 3 of the contract. No escrow was opened as the contract required, and the balance of the \$50,000 purchase price was strictly retained within Aero Nautical's sole control. Thus, Aero Nautical breached the option contract, and its decision to withhold the \$47,500 and failure to open the escrow were unjustified and no legal basis existed for it to do so.

1 Aero Nautical breached the option contract. Aero Nautical had the sole control over the
2 option election. It did not have control, once the election was made, as to how and under what conditions
3 the transaction should be closed. Its efforts to change the contract's terms, in that regard, was a breach.

4 The court also finds and concludes, considering the totality of the circumstances, that the
5 option contract was independent of, and separate from, the other portions of the September 29, 2000
6 contract, and that such was the intention of the parties.

7
8 **3. Tax Reimbursement**

9
10 Apparently, Aero Nautical paid taxes on the option property, or other Arimetco property,
11 for the two-year interval between the September 29, 2000 contract and the attempted exercise of the
12 option. That sum amounted to approximately \$3,500 to \$4,775.02. (See Ex. N.)

13 No provision of any contract provided for such a voluntary expenditure of funds by Aero
14 Nautical on behalf of the Debtor. The Debtor is therefore not responsible for reimbursement to Aero
15 Nautical for those monies which it chose to voluntarily advance on Arimetco's behalf.

16 The foregoing rationale also applies to any voluntary payments made on the dam permits.

17
18 **CONCLUSION**

19
20 The following summarizes the rulings of the court:

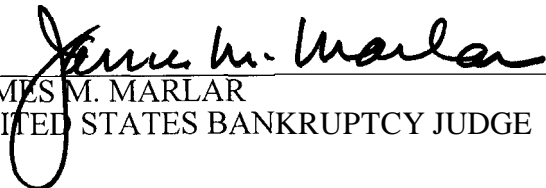
- 21 1. Arimetco did not breach the September 29, 2000 contract, and Aero
22 Nautical's claim for damages is dismissed;
23 2. Aero Nautical did not properly exercise its option agreement, and
24 Arimetco is relieved of any further obligations thereunder; and
25
26

1 3. Arimetco is not liable to Aero Nautical for tax payments voluntarily made
2 by Aero Nautical, nor for dam permit payments, and Aero Nautical's
3 claims for damages on that theory are dismissed.

4
5 **RULING**

6
7 Judgment shall be entered for Arimetco on all counts and theories. Counsel for Arimetco
8 shall lodge a form of judgment within ten days. This is a final order, and no additional issues need to be
9 resolved on this contested matter.

10
11 DATED: October 12, 2005.

12
13 
14 JAMES M. MARLAR
 UNITED STATES BANKRUPTCY JUDGE

15 COPIES served as indicated below this 13
16 day of October, 2005, upon:

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